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90-1697

No.

Supreme Court, U.S.
FILED
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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM 1990

JOSEPH F. CADA,

Petitioner,

vs.

BAXTER HEALTHCARE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court granted summary judgment in this case under the Age Discrimination in Employment Act ("ADEA") based on analyzing and weighing evidence contrary to legal principles applicable to all other cases dealing with the grant of summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

2. Whether Rule 56 is being used by the District Courts in employment discrimination cases to avoid the troublesome and time-consuming litigation necessitated in trials of cases under the ADEA.

3. Whether the limitations period for filing with the Equal Employment Opportunity Commission ("EEOC") under the ADEA should

start to run only when notice is given to the employee from someone whom the employee views as having the proper authority.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
TABLE OF CONTENTS	3
TABLE OF AUTHORITIES	5
REFERENCES TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS	6
JURISDICTIONAL STATEMENT	7
STATUTES, ORDINANCES AND REGULATIONS	9
STATEMENT OF CASE	13
A. Proceedings Below	13
B. Statement of Facts Relevant on Review	15
ARGUMENT	22
I. CONSIDERATIONS AS TO WHY CERTIRARI SHOULD BE GRANTED	22
II. THE LIMITATIONS PERIOD SHOULD BEGIN TO RUN AT THE TIME THAT EMPLOYEE RECEIVES NOTICE FROM THE PROPER AUTHORITY, AS PERCEIVED BY THE EMPLOYEE	25

III. RULE 56 IS BEING IMPROPERLY USED BY THE DISTRICT COURTS 36

IV. THE LIMITATIONS PERIOD SHOULD BEGIN TO RUN AT THE TIME THAT EMPLOYEE RECEIVES NOTICE FROM THE PROPER AUTHORITY, AS PERCEIVED BY THE EMPLOYEE 41

APPENDIX . . . . . A-1 - A-21

TABLE OF AUTHORITIES

Rule 56 of the Federal Rules of Civil Procedure. Summary Judgment. 9

Age Discrimination in Employment Act, 29 U.S.C. §623(a) 10

Age Discrimination in Employment Act, 29 U.S.C. §626(c) and (d) 10,11,12

Federal Rules of Civil Procedure, Rule 56, 28 U.S.C.A., Headnotes, 201, 521, 522, 523, 527, 530, 531, 536, 539 30,31,32,33

Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir. 1981) 38

Carpenter v. Board of Regents of the University of Wisconsin, 529 F.Supp. 525, 531 (W.D. Wis. 1982) 43,44

Delaware State College v. Ricks, 449 U.S. 250 (1980) 41

Janowiak v. Corporate City of South Bend, 750 F.2d 557 (7th Cir. 1984) 37

Linn v. Andover Newton Theological School, 642 F.Supp. 11 (D.Mass. 1985) . 44

Meyer v. Riegel Products Corp., 720 F.2d 303 (3rd Cir. 1983) 37

Mull v. ARCO Durethene Plastics, Inc., 784 F.2d 284 (7th Cir. 1986) 41

Ott v. Midland-Ross Corporation, 600 F.2d 24 (6th Cir. 1979) 39

Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988) 37

Palucki v. Sears, Roebuck & Company, 879 F.2d 1568 (C.A. 7, 1989) 34

Shager v. Upjohn Company, 913 F.2d 398 (7th Cir. 1990) 36

Wilkerson v. Siegfried Insurance Agency, 621 F.2d 1042 (10th Cir. 1980) 38

REFERENCES TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The decision of the Court of Appeals has been reported in Cada v. Baxter Healthcare Corporation, 920 F.2d 446 (7th Cir. 1990).

JURISDICTIONAL STATEMENT

By a ruling dated December 13, 1990, the Court of Appeals for the Seventh Circuit affirmed the District Court's ruling granting summary judgment in favor of the defendant, Baxter Healthcare Corporation. The Court of Appeals denied plaintiff's Petition for Rehearing by an Order dated January 17, 1991.

The original ruling granting summary judgment in favor of the defendant was rendered in the District Court for the Northern District of Illinois, the Honorable Harry D. Leinenweber, presiding, on March 20, 1990.

Jurisdiction of this court to review the judgment of the Court of Appeals for the Seventh Circuit is invoked or sought under

Title 28, Judiciary and Judicial Procedure, 28 U.S.C. §1254 and Supreme Court Rule 10.1, 28 U.S.C.A. Supreme Court Rule 10.

STATUTES, ORDINANCES AND REGULATIONS

RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE. SUMMARY JUDGMENT.

"* * *

"(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

"(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.* * *" 28 U.S.C. Rule 56.

AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 U.S.C. §623(a):

"(a) Employer practices

"It shall be unlawful for an employer--

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> "(3) to reduce the wage rate of any employee in order to comply with this chapter.* * *" 29 U.S.C. §623.

AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 U.S.C. §626(c) and (d):

"* * *

"(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

"(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

"(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a rsult of a violatin of this chapter, regardless of whether equitable relief is sought by any party in such action.

"(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

"No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

"(1) within 180 days after the alleged unlawful practice occurred; or

"(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

"Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.* * *" 29 U.S.C. §626(c),(d).

STATEMENT OF THE CASE

The original action in the District Court for the Northern District of Illinois arose under the Age Discrimination in Employment Act of 1967 (hereinafter referred to as "ADEA"), as amended, 29 U.S.C. §621 et seq., and the Fair Labor Standards Act, 29 U.S.C. §216, as incorporated by reference by the ADEA in 29 U.S.C. §626(b). Jurisdiction of the original action was invoked pursuant to 28 U.S.C. §1343(4) and 29 U.S.C. §§216(b) and 626(c)(1).

A. Proceedings Below.

The original action was an age discrimination case filed on December 12, 1988 under the ADEA, 29 U.S.C. §621, et seq. Plaintiff alleged that defendant, Baxter

Healthcare Corporation ("Baxter") discriminated against him on the basis of age when it discharged him as the Manager of Marketing Communications from its V. Mueller Division in Niles, Illinois in May 1987. The employer moved for summary judgment, based on various grounds, alleging that there were no genuine issues of material fact and that the employer was entitled to judgment as a matter of law. One of the grounds for the defendant's summary judgment motion was that plaintiff had failed to timely file his charge of discrimination with the EEOC within the applicable 300-day ADEA limitations. The District Court for the Northern District of Illinois granted defendant's motion for summary judgment, and in so doing, reasoned

that the plaintiff failed to timely file his EEOC charge. The District Court did not reach consideration of the other grounds set forth by defendant in its Summary Judgment Motion.

On review, the Court of Appeals for the Seventh Circuit affirmed the lower court's grant of summary judgment and held that plaintiff's suit was time-barred. The court denied plaintiff's Petition for Rehearing by an Order dated January 17, 1991.

B. **Statement of Facts Relevant on Review**.

Plaintiff was the manager of Baxter's Marketing Communications or Creative Services Department in the V. Mueller Division located in Niles, Illinois. One of the many functions of the manager of Marketing

Communications was to produce the catalog, otherwise known as the "armamentarium," of the company's drug products. Plaintiff first began working for the V. Mueller Division in November 1979 when, at that time, it was a division of American Hospital Supply Corporation ("AHSC"), which was acquired by Baxter in 1985. Since 1980, plaintiff had always reported directly or indirectly to the Vice President of Marketing. In 1987, the plaintiff reported in almost all aspects of his position to the Vice President of Marketing, who at the time of his dismissal, was Jim Stauner. However, beginning in early 1987 and for the purpose of the catalog project only, plaintiff reported to a Mr. Jim Becks, who had been the company's Director of

Sales and Marketing but had then become the Vice President of Business Planning and Development in April 1987.

Cada, in his deposition taken on June 12, 1989, testified as to meeting with Becks on May 5, 1987. He was told that "the company was reorienting" Cada's department and that since Cada "was approaching the age of 65," Becks "assumed that" Cada "was going to retire, and that they were looking for a replacement for" Cada. Cada responded that "I had no intention of retiring until I reached the age of 70." He also testified that he told Becks that "we had in the past gone through reorganizations and the marketing communications department always came through. And why was I being retired?"

Cada further testified that Becks told him that "the decision had been made and that they were searching for my replacement, who would probably be in the organization around the end of June, early July; and that I could expect to be terminated about two weeks after that, because they wanted me to stay on for a while to orient the new person." There was no written record of this meeting and no record in the company records pertaining to termination of Cada on May 5.

Cada did not believe that what he was being told was a communication from a person with authority to discharge him. Cada, as Manager of Marketing Communications, reported directly to Jim Stauner, the Vice President of Marketing. Plaintiff was uncertain

whether Becks was under some misapprehension that plaintiff was retiring or whether Becks was urging him to take early retirement.

On May 5, Cada attempted to see Stauner, but Stauner was unavailable and it was not until May 22, 1987 that plaintiff met with Stauner, who then told him that the decision had been made.

Cada, in his Affidavit, asserted that he did not believe that Baxter's final decision to replace him was made until after the meeting with Stauner. He testified that he based this conclusion on the ambiguous nature of Becks' suggestion of early retirement and the fact that Becks was not his superior in his job as Manager of Marketing Communications and that he has always

reported to the Vice President of Marketing. His Affidavit asserted that Becks' primary job was as Vice President of Business Planning and Development which had no functional relationship to Marketing.

On July 7, 1987, plaintiff's replacement started work. Since the replacement was much younger than plaintiff and was in her mid-20s, plaintiff first began to suspect that defendant had discriminated against him on the basis of age. Plaintiff went to the EEOC to complete an intake questionnaire charging defendant with age discrimination on March 1, 1988, which was more than 300 days after his meeting with Becks on May 5, 1987, but less than 300 days after his meeting with Stauner on May 22, 1987. For cases filed in

Illinois, the administrative statute of limitations under the age discrimination law is 300 days.

ARGUMENT

I.
CONSIDERATIONS AS TO WHY CERTIORARI SHOULD BE GRANTED.

In this case, the District Court granted summary judgment and the Court of Appeals affirmed. The case arose under the Age Discrimination in Employment Act and there were significant factual questions which could not be resolved on motion for summary judgment if the legal principles applicable to all other cases dealing with summary judgment under Rule 56 of the Federal Rules of Civil Procedure as followed by all of the circuits had been applied. The District Court and the Court of Appeals, by selective analysis of facts and contrary to the general principles applicable to determinations on

summary judgment, adopted a variant rule in this Age Discrimination in Employment case.

This question becomes of even greater significance in that it appears that Rule 56 is being used by the district courts to avoid the troublesome and time-consuming litigation entailed by trials of cases under the Age Discrimination in Employment Act. This court should address that question and rule that, in cases of summary judgment, the same rules applicable to other cases apply in Age Discrimination in Employment cases.

A further reason for granting certiorari is that the Court of Appeals has adopted a rule as to date of notice to the employee for purpose of determining limitations which runs limitations from a date when the employee

received information from someone other than his superior rather than the date on which the employee was clearly and unequivocally told by his superior that he was terminated. This court should instruct that the running of limitations should begin from clear and unequivocal notice from a proper authority which could not be misapprehended by the employee.

II.

THE COURT OF APPEALS PERMITTED SUMMARY JUDGMENT TO STAND AND, IN DOING SO, FAILED TO FOLLOW LONG-ESTABLISHED RULES RELATING TO SUMMARY JUDGMENT.

The Court of Appeals affirmed the grant of summary judgment by the district court. The district court, in granting summary judgment, resolved issues of fact which should have been left for determination by the trier of fact.

Using the first date of any conversations on the subject, May 5, 1987, the District Court held that the Cada action was time barred in that, measured from that date, the date of filing with the EEOC was one day beyond the 300-day rule.

The District Court and the Court of Appeals disregarded substantial evidence

which would have prevented summary judgment if the standard rules applicable to summary judgment had been applied. This evidence included the following:

A. The advice given on May 5 which was claimed to be notice of termination, was equivocal and there was no written record of the meeting at which the advice was given.

B. The advice was given by James Becks who was not Cada's superior.

C. There was no record in the company indicating that May 5, 1987 was the date of termination.

D. Cada testified that James Stauner was his superior, that Stauner was not available on May 5 and that

Cada's first knowledge that he was to be discharged came from Stauner on May 22.

E. The written records of the company show that Stauner was, in fact, Cada's superior.

F. The written record shows that the company did not, in either its written response in the initial proceedings before the EEOC filed on May 27, 1988 or in its supplemental letter of September 16, 1988, assert that the Cada claim was time barred. Those proceedings were answered by an experienced person in charge of Human Resources who was broadly experienced in the Age Discrimination in Employment Act. The obvious inference is that May

5 was not the actual date of termination.

I. There had been reorganizations in the past which had not become effective. While Cada was obviously concerned in the conversation on May 5, his concern did not amount to a notice of discharge. It was more directed to an urge that he take early retirement.

The rulings of the District Judge and the affirmance by the Court of Appeals emphasize certain aspects of Cada's testimony and disregard others. The District Court granted summary judgment on the assumption that only one inference was possible from Cada's testimonial recollection of what happened on

May 5. Further, the District Court's inference was drawn in an unfavorable light to plaintiff, the nonmovant. All counter-evidence was disregarded. Inferences favorable to the nonmovant were not made. No other explanation was acceptable to the District Judge -- despite counter-evidence. The District Judge relied on other testimony of Becks, a witness which it had never heard, and assumed that that testimony was true. The District Court disregarded the strong inferences from the documentary file above set forth.

This Petition for Certiorari in this case is based on the failure of the Court of Appeals to require the District Court to follow the standard rules applicable to

considerations of questions of fact on motions for summary judgment. Without laboring the point and since these rules are so entirely standard and so long established, we merely quote the following first head notes under each heading, from the Federal Rules of Civil Procedure, Rule 56, 28 U.S.C.A.:

"201. **Generally**

"Although certainty that there are no unresolved factual issues is necessary to grant summary judgment, any uncertainty in that regard is sufficient to deny summary judgment. Greenebaum Mortg. Co. v. Town and Garden Associates, C.A.Ill.1967, 385 F.2d 347." p. 73.

* * * *

"521. **Generally**

"Since it is movant who bears onus of establishing his entitlement to summary judgment, his opponent enjoys

benefit of all favorable inferences from evidence proffered, and facts asserted by nonmovant, if adequately buttressed by evidentiary material, are to be taken as true. Abraham v. Graphic Arts Intern. Union, 1981, 660 F.2d 811, 212 U.S.App. D.C. 412."

* * * *

"522. **Duty of court**

"In passing upon motion for summary judgment, district court is required to view case in light most favorable to non-moving party and to give him the benefit of all inferences in his favor that reasonably may be drawn from the evidence; even though facts in case may be undisputed, it does not necessarily follow that summary judgment is appropriate, because court must still consider the legal questions raised by undisputed facts. Watts v. Brewer, C.A. Iowa 1978, 588 F.2d 646.

* * * *

"523. **Evidence from which inference drawn**

"Party opposing motion for summary judgment is entitled to have all facts viewed in light most favorable to it and

all reasonable inferences which may be drawn from facts. Standard Oil Co. v. Department of Energy, Em.App. 1978, 596 F.2d 1029."

* * * *

"527. **Questions of fact**

"Factual inferences tending to show triable issues of material fact should be viewed in light most favorable to existence of such issues in assessing motion for summary judgment. Harsha v. U.S., C.A. Okl. 1979, 590 F.2d 884."

* * * *

"530. **-- Preclusion of summary judgment**

"Where different ultimate inferences may properly be drawn, the case is not one for summary judgment. Luckett v. Bethlehem Steel Corp., C.A. Okl. 1980, 618 F.2d 1373."

* * * *

"531. **-- Reasonableness of inferences**

"Where reasonable men might draw different inferences even from same established facts, issue should be resolved by fact finder after full

hearing of all evidence rather than by summary judgment. In re Yarn Processing Patent Validity Litigation, C.A. Fla 1974, 498 F.2d 271, certiorari denied 95 S.Ct. 640, 419 U.S. 1057, 42 L.Ed2d 654."

* * * *

"536. **Affidavits**

"In ruling on a summry judgment motion, all inferences to be drawn from the facts contained in the affidavits, exhibits, and depositions are to be drawn in favor of the non-movant. Cedillo v. International Ass'n of Bridge & Structural Iron Workers, Local Union No. 1, C.A. Ill. 1979, 603 F.2d 7."

* * * *

"539. **Credibility of witnesses**

"In considering summary judgment motion, court must resolve all inferences and issues of credibility in favor of the nonmoving party. Plainwell Paper Co., Inc. v. Pram, Inc., D.C. Pa. 1977, 430 F.Supp. 1386."

The effort to invoke a variant rule applicable to the grant of summary judgment in ADEA cases was inserted in this case by the Memorandum filed by Baxter in support for its Motion for Summary Judgment where, on page 14, it argued for a special rule and cited language of Judge Posner in the case of Palucki v. Sears, Roebuck & Company, 879 F.2d 1568 (C.A. 7, 1989). In its Memorandum, Baxter stated that "recently, the Seventh Circuit expressly recognized the importance of summary judgment motions in employment actions" and quoted the following language from the Palucki case:

> "The workload crisis of the federal courts, and realization that Title VII is occasionally or perhaps more than occasionally used by plaintiffs as a substitute for principles of job protection that do not yet exist in

> American law, have led the courts to take a critical look at efforts to withstand defendants' motions for summary judgment. A district judge faced with such a motion must decide, subject of course to plenary appellate review, whether the state of the evidence is such that, if the case were tried tomorrow, the plaintiff would have a fair chance of obtaining a verdict. If not, the motion should be granted and the case dismissed." Palucki, 879 F.2d at 157273.

As it turned out, Judge Posner was on the panel and wrote the opinion in this case. There is a strong inference of intellectual bias against this kind of case. In effect, the court applied that bias, to read out all facts negative to the request for summary while there may have been few negative facts in Palucki, in this case the contrary facts and inferences abounded.

III.
RULE 56 IS BEING IMPROPERLY USED BY THE DISTRICT COURTS.

The larger question in this case is whether, in Age Discrimination in Employment Act cases, the district courts, in an effort to clear their calendars, are applying the rules applicable to the grant of summary judgment differently than the application of such rules to all other cases. To support this assertion, we refer to the following cases:

> Shager v. Upjohn Company, 913 F.2d 398 (7th Cir. 1990) (7th Cir. reversed District Court's grant of summary judgment for employer on the issue whether the employee had established prima facie case of age discrimination);

Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988) (Court of Appeals reversed District Court's grant of summary judgment for employer based on issue of whether employee could establish prima facie case of age discrimination);

Janowiak v. Corporate City of South Bend, 750 F.2d 557 (7th Cir. 1984) (Court of Appeals reversed District Court's grant of summary judgment to employer on issue of whether the limitations period within which employee was to file employment discrimination action was equitably tolled);

Meyer v. Riegel Products Corp., 720 F.2d 303 (3rd Cir. 1983) (Court of Appeals reversed District Court's entry

of summary judgment in favor of employer on the issue of whether employee had timely filed his charge of age discrimination);

Wilkerson v. Siegfried Insurance Agency, 621 F.2d 1042 (10th Cir. 1980) (Court of Appeals reversed District Court's grant of summary judgment for employer on issue of whether limitations period for plaintiff to file Notice of Intent to Sue was equitably tolled);

Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir. 1981) (Court of Appeals reversed District Court's entry of summary judgment for employer on the issue of whether employee's charges of discrimination were timely filed);

Ott v. Midland-Ross Corporation, 600 F.2d 24 (6th Cir. 1979) (Court of Appeals reversed District Court's entry of summary judgment in favor of employer on issue of equitable tolling for filing of employee's age discrimination claim).

It is certainly a temptation for a district judge to clear his or her calendar of cases which involve difficult factual determinations in an area which depends on inferences, motives, and intent. But this does not justify the abandonment of the normal rules which are precedent to summary judgment. This court should reverse the Court of Appeals and make clear that ADEA and other employment discrimination cases are not

to be handled differently than other cases on questions of summary judgment.

IV.
THE LIMITATIONS PERIOD SHOULD BEGIN TO RUN AT THE TIME THAT EMPLOYEE RECEIVES NOTICE FROM THE PROPER AUTHORITY, AS PERCEIVED BY THE EMPLOYEE.

In employment discrimination cases, the limitations period begins to run upon notice of the adverse employment decision. Delaware State College v. Ricks, 449 U.S. 250 (1980); see also Mull v. ARCO Durethene Plastics, Inc., 784 F.2d 284 (7th Cir. 1986).

The question of when such notice is deemed to have been given must be resolved. The courts have decided that, for such notice to be deemed given for purposes of the running of the limitations period, notice must be unequivocal. Mull, Id. at 288. In situations where the purported notice is given either by one who is not the direct

superior or hiring/firing authority of the employee or one who does not have final authority for the decision, the limitations period should not begin to run until the employee receives notice of an official, final decision from the proper authority.

Some cases have already so held, as follows:

> In a case where the employee is being informed of some employment decision from a person who is not the direct superior or properly authorized person, the limitations period should not start to run until the reasonable person standing in the employee's shoes believes that he has received a formal, properly-authorized final notice rather

than some unauthorized or unreviewed notice; in other words, the ADEA limitations period should only begin to run when the employee has been put on notice of the employer's official and final decision. Carpenter v. Board of Regents of the University of Wisconsin, 529 F.Supp. 525, 531 (W.D. Wis. 1982). In the Carpenter case, the District Court held that the limitations period did not begin to run until the plaintiff received the chancellor's formal, final notice, as required by the rules and regulations of this school, rather than the Dean's informal notice of termination. Id.

In Linn v. Andover Newton Theological School, 642 F.Supp. 11 (D.Mass. 1985), the Massachusetts District Court also utilized the Carpenter reasonable person standard, which starts the running of the limitations period at the time when a reasonable person would have been put on notice of defendant's official and final decision to terminate. As such, the Linn court held that plaintiff was not put on notice by the school president's letter of termination for purposes of the limitations period but was put on notice after the Board of Trustees' approval of his termination, since the school's regulations stipulated that the

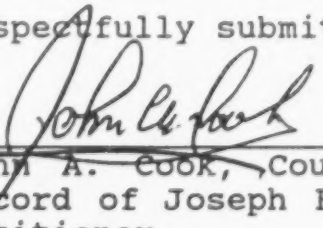
Board of Trustees had ultimate power to discharge. Id. at 12-13.

Similarly, in our case, plaintiff received some sort of notice from Becks on May 5, 1987, but Becks was not his direct superior and was not in plaintiff's hiring/firing line of authority, to plaintiff's knowledge. Since Becks was not the contemplated or usual hiring/firing authority for plaintiff's position, the purported "notice" given by Becks should not start the running of the limitations period with respect to the ultimate termination decision made by the defendant. Rather, the notice by Stauner, who was plaintiff's direct superior and usual and typical hiring/firing authority, should be deemed the final and

official decision or notice which would start the running of the limitations period for plaintiff's filing of an age discrimination charge before the EEOC.

The issue of whether the limitations period should only begin to run upon receipt of properly authorized notice is an important one which should be resolved by this court so that the various circuits can uniformly apply the law.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

January 17, 1991

Before

Hon. Harlington Wood, Jr., Circuit Judge

Hon. Richard A. Posner, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

JOSEPH F. CADA,	)	Appeal from the
	)	United States
	)	District Court
Plaintiff-Appellant,	)	for the Northern
	)	District of
	)	Illinois, Eastern
No. 90-1888 vs.	)	Division.
	)	
	)	Case No. 88 C
BAXTER HEALTHCARE	)	10419
CORPORATION,	)	Harry D.
	)	Leinenweber,
Defendant-Appellee.	)	Judge

ORDER

On December 27, 1990, plaintiff-appellant filed a petition for rehearing. All of the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: December 13, 1990

BEFORE: Hon. Harlington Wood, Jr., Circuit Judge

Hon. Richard A. Posner, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

No. 90-1888

JOSEPH F. CADA,

Plaintiff-Appellant,

vs.

BAXTER HEALTHCARE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Cour
for the Northern District of Illinois
Eastern Division; Case No. 88 C 10419; Judg
Harry D. Leinenweber

This cause was heard on the record fro
the above mentioned district court, and wa
argued by counsel.

On consideration whereof, IT IS ORDERE
AND ADJUDGED by this Court that the judgmen
of the District Court in this cause appeale
from be, and the same is hereby, AFFIRMED
with costs, in accordance with the opinion o
this Court filed this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 90-1888

JOSEPH F. CADA,

Plaintiff-Appellant,

v.

BAXTER HEALTHCARE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 10419—Harry D. Leinenweber, *Judge.*

ARGUED OCTOBER 31, 1990—DECIDED DECEMBER 13, 1990

Before WOOD, JR., POSNER, and EASTERBROOK, *Circuit Judges.*

POSNER, *Circuit Judge.* The plaintiff, Joseph Cada, complains that the defendant, Baxter Healthcare, fired him in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* The district court granted summary judgment for the defendant on the ground that the suit was time-barred, and dismissed the suit. The appeal presents fascinating and important questions regarding statutes of limitations generally and the age discrimination statute of limitations in particular.

Cada was the manager of Baxter's "creative services" department, the principal function of which was to produce the catalog of the company's drug products (the "armamentarium," as such catalogs are known). On the catalog project Cada reported to Jim Becks, the company's director of sales and marketing, although in all other respects he reported to Jim Stauner, the vice president for marketing. In April 1987 Becks was promoted to vice president for business planning and development but retained supervisory authority over the catalog project. The project was chronically behind schedule and over budget, and shortly after his promotion Becks asked Cada for a comprehensive report. Armed with this report Becks discussed the project with the company's president and the other vice presidents in a series of meetings late in April. They decided that the department should be reorganized to emphasize more aggressive tactics for marketing Baxter's products and that Cada was not the man to head up the reorganized department. On May 5 Becks met with Cada to inform him that the department would be reorganized and that he assumed Cada would be retiring because he was approaching 65. When Cada responded that he was not planning to retire, Becks told him that in that event he would be terminated about two weeks after a new manager for the department was hired, probably in July. Cada claims that he did not believe Becks had the authority to fire him and was even unsure whether Becks was attempting to fire him, as distinct from urging him to take early retirement.

Right after the meeting with Becks, Cada did two things. He went to the company's human resources department and obtained a packet of outplacement and benefit forms, which he filled out a few days later. And he tried to see Stauner, whom he considered his real supervisor. Stauner was unavailable and it was not till May 22 that they were able to meet. At that meeting Stauner told him that the decision to fire Cada had been made by Becks and that he, Stauner, could do nothing about it. On July 7 Cada's replacement appeared. She was a young woman. Three

weeks after she started work, Cada was terminated. He filed his complaint with the Equal Employment Opportunity Commission on March 4, 1988, which was more than 300 days after his meeting with Becks on May 5, 1987, but less than 300 days after his meeting with Stauner on May 22. The administrative statute of limitations in the age discrimination law is 300 days for cases filed in Illinois. *Davidson v. Board of Governors*, No. 90-1995, slip op. at 2 (7th Cir. Dec. 13, 1990).

In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the question was whether a cause of action for discrimination accrued when the plaintiff was denied tenure, allegedly on discriminatory grounds, or when his employment contract expired a year later; the Court held that it was the former. Baxter argues that, similarly, the date on which Cada was told he was terminated—May 5—was the date on which the statute of limitations started to run, not May 22 when the termination was confirmed by Stauner, or the end of July when Cada actually left Baxter's employ. Against this argument, which persuaded the district judge, Cada hurls a barrage of counterarguments: that Becks had no authority to fire Cada, so there was no adverse personnel action on May 5—the decision to terminate was made by Stauner on May 22 when he met with Cada; that whatever Becks's actual authority, Cada sincerely and reasonably believed that Becks was not authorized to fire him; and that not until Cada learned that his replacement was young and relatively inexperienced did he realize he was a victim of age discrimination, so the statute of limitations did not begin to run until then (July 7).

To Cada's point about Becks's authority to fire him on May 5, Baxter's first reply is that all that matters is that a reasonable person in Cada's position would have thought he was being fired. This cannot be right. Suppose someone had forged a letter from Becks to Cada, announcing that Cada was fired, which Cada received on May 1. Would the statute of limitations have begun to run on May 1? Surely no, though at argument Baxter's counsel said yes.

Or suppose a year earlier Cada had gone to a fortune teller, who had gazed into her crystal ball and there seen Cada drawing unemployment benefits. Would the statute of limitations have begun to run on that day? Again the answer is no. The statute of limitations does not begin to run until the defendant takes some action, whatever the plaintiff knows or thinks. *Ricks* does not hold that the statute of limitations begins to run as soon as the handwriting is on the wall. The point was not that when Ricks was denied tenure he knew his days were numbered. The point was that the denial of tenure was an adverse personnel action forbidden if done for discriminatory reasons; it was irrelevant that the full consequences of the action were not felt till later, when Ricks, unprotected by tenure, was let go upon the expiration of his employment contract. In our forged-letter and crystal-ball cases the employee learned his fate before any adverse personnel action was taken, and until it is taken his claim has not accrued and the statute of limitations has not begun to run. Compare *In re UNR Industries, Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984).

So if Becks was merely telling Cada that he had better take early retirement because he, Becks, was going to advise Stauner, Cada's direct superior, to fire him, then no adverse personnel action was taken at the May 5 meeting and the statute of limitations did not begin to run then, any more than it would have begun to run in *Ricks* if and when a faculty member had told Ricks a month before the vote on tenure that he was going to vote against him. But Baxter submitted to the district court a mass of testimonial material all to the effect that, before May 5, the president of the division of Baxter in which Cada worked had authorized Becks to reorganize the creative services department and in the process to jettison Cada. This evidence, which was not contradicted, showed that Becks was authorized to fire Cada and that he did so at the May 5 meeting. By Cada's own version of the meeting of May 22 with Stauner, Stauner merely made clear at that meeting that Becks had been acting within his actual authority when he fired Cada. The May 5 meet-

ing was the equivalent of the tenure vote in *Ricks*. It was the making and communication to Cada of the decision to fire him effective within a few weeks after Cada's replacement came on board.

We just said "communication," but suppose the decision was not *clearly* communicated to Cada. Suppose, as Cada's deposition suggests, that Becks pussyfooted around and as a result Cada failed to get the message until his interview with Stauner on May 22. And suppose further that until his replacement appeared on July 7, Cada could not be reasonably confident that he had been fired because of his age. Would it not be unreasonable to hold that the statute of limitations began to run before he was in full possession of the information—that he had indeed been fired and that he had been replaced by a much younger person—which he needed in order to decide whether he had a claim against Baxter under the age discrimination law?

Unfortunately it is not possible to answer this question with a simple yes or no. We must first distinguish between the *accrual* of the plaintiff's claim and the *tolling* of the statute of limitations, then between two doctrines of tolling, last between different kinds of information that Cada may or may not have possessed. Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date—often the same, but sometimes later—on which the plaintiff discovers that he has been injured. The rule that postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured is the "discovery rule" of federal common law, which is read into statutes of limitations in federal-question cases (even when those statutes of limitations are borrowed from state law) in the absence of a contrary directive from Congress. *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000, 1004 (7th Cir. 1984), overruled on other grounds in *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990); *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988);

Cullen v. Margiotta, 811 F.2d 698, 725 (2d Cir. 1987); *Nichols v. Hughes*, 721 F.2d 657, 659 (9th Cir. 1983); *Trotter v. International Longshoremen's & Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983) (per curiam). The discovery rule is implicit in the holding of *Ricks* that the statute of limitations began to run "at the time the tenure decision was made *and communicated* to Ricks," 449 U.S. at 258 (emphasis added). If Cada did not discover that he had been injured, i.e., that a decision to terminate him had been made, until May 22, the statute of limitations did not begin to run till that day and his suit is not time-barred.

It may not be time-barred even if the statute of limitations began to run earlier. Tolling doctrines stop the statute of limitations from running even if the accrual date has passed. Two tolling doctrines might be pertinent here (others include the plaintiff's incapacity and the defendant's fugitive status). One, a general equity principle not limited to the statute of limitations context, is equitable estoppel, which comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946); *Mull v. ARCO Durethene Plastics, Inc.*, 784 F.2d 284, 292 (7th Cir. 1996); *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983). Equitable estoppel in the limitations setting is sometimes called fraudulent concealment, but must not be confused with efforts by a defendant in a fraud case to conceal the fraud. To the extent that such efforts succeed, they postpone the date of accrual by preventing the plaintiff from discovering that he is a victim of a fraud. *Jensen v. Snellings, supra*, 841 F.2d at 606-07. They are thus within the domain of the discovery rule. Fraudulent concealment in the law of limitations presupposes that the plaintiff has discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant—above and beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time.

If Baxter had told Cada that it would not plead the statute of limitations as a defense to any suit for age discrimination that he might bring, this would be a case for equitable estoppel; so also if Baxter had presented Cada with forged documents purporting to negate any basis for supposing that Cada's termination was related to his age. Cada tries to bring himself within the doctrine by contending that the reorganization of the creative services department was a ruse to conceal the plan to fire him because of his age. This merges the substantive wrong with the tolling doctrine, ignoring our earlier distinction between two types of fraud. It implies that a defendant is guilty of fraudulent concealment unless it tells the plaintiff, "We're firing you because of your age." It would eliminate the statute of limitations in age discrimination cases.

The second tolling doctrine is equitable tolling. It permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim. *Holmberg v. Armbrecht*, *supra*, 327 U.S. at 397; *Mull v. ARCO Durethene Plastics, Inc.*, *supra*, 784 F.2d at 291. Equitable tolling is frequently confused both with fraudulent concealment on the one hand and with the discovery rule—governing, as we have seen, accrual—on the other. It differs from the former in that it does not assume a wrongful—or any—effort by the defendant to prevent the plaintiff from suing. It differs from the latter in that the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant. If a reasonable man in Cada's position would not have known until July 7 that he had been fired in possible violation of the age discrimination act, he could appeal to the doctrine of equitable tolling to suspend the running of the statute of limitations for such time as was reasonably necessary to conduct the necessary inquiry. The qualification "possible" is important. If a plaintiff

were entitled to have all the time he needed to be *certain* his rights had been violated, the statute of limitations would never run—for even after judgment, there is no certainty.

The rule in the federal courts is that both tolling doctrines—equitable estoppel and equitable tolling—are, just like the discovery rule, grafted on to federal statutes of limitations. *Holmberg v. Armbrecht*, *supra*, 327 U.S. at 397; *Irwin v. Veterans Administration*, 1990 U.S. LEXIS 6120, at pp. 4-5 (U.S. Dec. 3, 1990). To this as to most legal generalizations, there are exceptions. Neither tolling doctrine applies to statutes of repose, *Short v. Belleville Shoe Mfg. Co.*, *supra*, 908 F.2d at 1391; their very purpose is to set an outer limit unaffected by what the plaintiff knows. Neither applies to a jurisdictional statute of limitations. *Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040-41 (D.C. Cir. 1986). These exceptions are inapplicable to the age discrimination law, and we have held therefore that both tolling doctrines apply to cases under that law. *Mull v. ARCO Durethene Plastics, Inc.*, *supra*, 784 F.2d at 291-92.

Many cases, it is true, in the age discrimination field as in other areas, fuse the two doctrines, presumably inadvertently. The most recent example in this circuit is *Stark v. Dynascan Corp.*, 902 F.2d 549, 551 (7th Cir. 1990), which quotes from an earlier case the erroneous statement that "to invoke equitable tolling, the plaintiff must therefore show that the defendant attempted to mislead him." In fact that is what the plaintiff must show if he is trying to invoke equitable *estoppel*. For equitable *tolling* all he need show is that he could not by the exercise of reasonable diligence have discovered essential information bearing on his claim. The fusion of the two doctrines in *Stark* was inadvertent. Had it been deliberate, the court would have had to circulate its opinion to the full court before publication, because it would have been overruling *Mull*—not to mention the Supreme Court (see below). 7th Cir. R. 40(f). That was not done.

Cerbone v. International Ladies' Garment Workers' Union, 768 F.2d 45 (2d Cir. 1985), fuses the two tolling doctrines in a different way by saying that equitable tolling differs from equitable estoppel only in that the plaintiff does not know he has a claim in the former case and does in the latter; in both cases the defendant has taken steps to prevent the plaintiff from suing. Plainly, the second part of this proposition is incorrect. *Holmberg* makes clear that equitable tolling does not require any conduct by the defendant. 327 U.S. at 397. See also *Irwin v. Veterans Administration*, *supra*, at p. 5. The first part of the proposition may be a correct generalization—the commonest case of equitable estoppel to plead the statute of limitations is where the defendant has promised not to plead it, and in such a case the plaintiff knows full well that he has a cause of action—but it should not be understood as creating a rule.

If the discovery rule extended the statute of limitations to May 22, then Cada is home free; and likewise if the statute of limitations was tolled between May 5 and July 7 (when he discovered that he had been replaced by a younger person), for his suit was, at worst, untimely by only two weeks. We consider the possibility of tolling first. The question is whether the statute of limitations was tolled for at least two weeks. Here the essential thing to grasp is that while it is entirely clear that the discovery rule if applicable gives the plaintiff the entire statute of limitations period in which to sue, counting from the date of discovery, and it is only a little less clear that if fraudulent concealment is shown the court must subtract from the period of limitations the entire period in which the tolling condition is in effect, *Orr v. Midland-Ross Corp.*, 600 F.2d 24, 33 (6th Cir. 1979), for otherwise the defendant would obtain a benefit from his inequitable conduct, it is not at all clear that equitable tolling—a doctrine that adjusts the rights of two innocent parties—is as generous. When Cada discovered on July 7 that he had been replaced by a young and (as it seemed to him) inexperienced employee, he still had eight months in which to file his claim

before the statute of limitations expired. He offers no excuse for the delay. When asked at his deposition when it was that he had first considered filing a complaint, he answered, "When I started kicking myself in the fanny for letting it go so long." And remember that we are speaking not of a judicial complaint, but of an administrative complaint. There is no duty of precomplaint inquiry in EEOC proceedings as distinct from federal court actions (Fed. R. Civ. P. 11). Cada could have prepared an adequate administrative complaint within days of July 7.

We do not think equitable tolling should bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term. Cf. *EEOC v. O'Grady*, 857 F.2d 383, 392 (7th Cir. 1988). It is, after all, an equitable doctrine. It gives the plaintiff extra time if he needs it. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations. Statutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. They protect important social interests in certainty, accuracy, and repose. The statute of limitations is short in age discrimination cases as in most employment cases because delay in the bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements. We should not trivialize the statute of limitations by promiscuous application of tolling doctrines. When we are speaking not of equitable estoppel but of equitable tolling, we are (to repeat) dealing with two innocent parties and in these circumstances the negligence of the party invoking the doctrine can tip the balance against its application—as it did, for example, in the *Irwin* case cited earlier.

It might seem that a rule of automatic extension would be much simpler to administer. The simplicity would be delusive. Inquiry would shift from how much time the plaintiff needed after he discovered the essential information bearing on his claim in order to prepare his complaint

to how much information really was essential. Suppose that on the day the adverse personnel action occurred the plaintiff had 90 percent of the information he needed to be sure he had a colorable claim, and the other 10 percent came in the next day. Would this mean he had 301 days to file his administrative complaint? Or is 90 percent enough? Since it is rare that by the end of the day of the adverse action the plaintiff will have all the requisite information, the automatic-extension rule would extend the statute of limitations in virtually all cases, making the ostensibly fixed deadline illusory.

In most cases in which equitable tolling is invoked, the statute of limitations has run *before* the plaintiff obtained information essential to deciding whether he had a claim. This pattern in the cases recognizes implicitly that the statute of limitations is not automatically delayed by the time it takes to obtain such information, since as we have said that will usually be sometime after the claim arose. When as here the necessary information is gathered after the claim arose but before the statute of limitations has run, the presumption should be that the plaintiff could bring suit within the statutory period and should have done so. The presumption will be more easily rebuttable the nearer the date of obtaining the information is to the date at which the statutory period runs out. In this case the interval was eight months, huge in the circumstances. We hold that a plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information. Cada failed to do this.

The only string left on Cada's bow is the discovery rule, which pushes back the beginning of the limitations period. The rule is not applicable here. Cada's action on May 5 in going from the meeting with Becks—whom he knew to be his supervisor on the catalog project and to have been recently promoted—directly to the human resources office to pick up severance forms is compelling, as well

as uncontested, evidence, which no rational jury would be entitled to discount, that he knew he had been fired. *Ricks* establishes that it is the date of firing or other adverse personnel action, not the date on which the action takes effect and the plaintiff is terminated, that—provided it is communicated to the employee, and it was here—is the date of accrual. If the plaintiff cannot within the statutory period gather the necessary information to prepare his complaint, he may be able to get more time under the equitable tolling doctrine, but we have just seen that Cada is not entitled to the benefit of that doctrine. His suit was time-barred. The judgment dismissing it is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—12-13-90—500

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

JOSEPH F. CADA, Plaintiff,	)	Docket No. 88 C 10419
-vs-	)	
BAXTER HEALTHCARE CORPORATION, Defendant.	)	Chicago, IL March 20, 1990 9:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARRY D. LEINENWEBER

APPEARANCES:

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THE CLERK: 88 C 10419, Cada vs. Baxter.

MS. MATIAS: Good morning, your Honor, Mercedes Matias for the plaintiff.

MR. CONNELL: Good morning, your Honor. Dana Connell for the defendant.

THE COURT: Plaintiff, Joseph F. Cada, has brought this suit claiming that defendant, Baxter Healthcare Corporation, violated the Age Discrimination in Employment Act by terminating him because of his age. This cause is presently before the Court on Baxter's motion for summary judgment. For the following reasons the motion is granted.

The ADEA provides that in EEOC "deferral" state such as Illinois, a charge of discrimination must be filed within three hundred days of the alleged unlawful

practice. The time period for filing a charge with the EEOC starts to run when the aggrieved party receives unequivocal notice of termination. Delaware State College v. Ricks, 101 S.Ct. 498, 504 (1980); Mull vs. ARco Durethene Plastics, Inc., 784, F.2d 284 (7th Cir. 1986). Cada filed an intake questionnaire with the EEOC alleging age discrimination on March 1, 1988. Baxter maintains that Cada received unequivocal notice of his termination on May 5, 1987 thus rendering his filing with the EEOC untimely. Cada, on the other hand, contends that he did not receive unequivocal notice of termination until May 22, 1987 which would mean that his March 1, 1988 EEOC filing was within the three hundred day time limit. The Court

concludes that Cada received notice of his termination on May 5, 1987 and that his EEOC filing was thus untimely.

On May 5, 1987, Cada met with James Becks, Baxter's Vice-President of Business Planning and Development. According to Cada's own deposition testimony, Becks "said the decision had been made, and that they were searching for my replacement, who would probably be in the organization around the end of June, early July; and that I could expect to be terminated about two weeks after that..." Immediately after their meeting, Becks took Cada to Alice Campbell, the compensation manager in the Human Resources Department, from whom he received a packet of outplacement and benefit forms. Shortly

thereafter, Cada began meeting with a counselor from Mainstream Access, the outplacement consultant with whom Baxter had contracted. Finally, on May 9, Cada filled out a severance and vacation election form.

Despite all this, Cada maintains that he was not given notice of his termination on May 5. He contends that when he met with Becks he did not believe that Becks had the authority to terminate him. It was not until May 22, Cada argues, when he met with another of his superiors who informed him that Becks did in fact possess such authority, that Cada realized that he had been terminated. Thus, Cada maintains, he did not receive notice of his termination until May 22, 1987 and it was

at that point that the limitations period began to run.

The Court rejects Cada's contention that the date when he first realized he had received notice of termination, rather than the date on which he was actually notified, should mark the start of the limitations period. Ricks and Mull merely require actual, unequivocal notice of termination to start the limitations period running. In so requiring, these cases focus on the time of the discriminatory act as triggering the limitations period. Thus the proper inquiry focuses on when the aggrieved party was notified of his termination rather than on when he first had the subjective belief that he had been notified.

In this case Cada's actions after hi
May 5 meeting with Becks appear to indicat
that, contrary to the argument he now makes
he in fact did believe that he was notifie
of his termination at the May 5 meeting
This is borne out by the fact that on May
he began meeting with an outplacemen
counselor and on May 9 he filled out
severance election form. As just noted
however, Cada's subjective belief regardi
notice of termination is irrelevant. What i
relevant and is beyond dispute, as Cada's o
deposition testimony makes clear, is tha
Becks did not in fact notify Cada on May
1987 that he would be terminated. The thr
hundred-day limitations period thus began
run on that day.

Cada next argues that even if his termination claim was untimely filed, he should be allowed to amend his complaint to cover the discrimination by Baxter in failing to hire him for the restructured position which Baxter created after terminating him. Since the limitations period on a failure-to-hire case begins to run when the hiring of an applicant is completed, late June, 1987, here, Cada's EEOC charge would be timely filed with regard to the failure-to-hire claim, if included in an amended complaint, would be dismissed because (1) Cada failed to apply for the restructured position and (2) the limitations period on such a claim would also have begun to run on May 5, 1987 when

Cada was notified that he would not have a position in the reorganized department.

Cada also contends that even if the limitations period began to run on May 5, 1987 the running of the period should be tolled on equitable grounds so as to render his EEOC charge timely. Cada maintains that he did not know he was being replaced by a younger worker until July 7, 1987, so the chare-filing period should have begun to run on that date. Generally, "equitable exceptions to the statutory limitations period should be sparingly applied." English v. Pabst Brewing Co., 828 F.2d 1047, (4th Cir. 1987). In addition, the doctrine of equitable tolling is usually reserved for situations where the defendant has wrongfully

deceived or misled the plaintiff in order to conceal the existence of a cause of action.

In this case Cada has alleged no concealment on Baxter's part of the existence of a cause of action. Furthermore, even if Cada's contention that he did not learn of the facts supporting his charge until July 7, 1987 is true, he still had almost eight months in which to timely file an EEOC charge and he has admitted that the delay in filing was his own fault. In light of these circumstances, the Court declines to equitably toll the running of the limitations period. Cada's claim that Baxter would not be prejudiced by allowing him to exceed the limitations period is inapposite as the "absence of prejudice to an opponent does not

support invocation of the doctrine of equitable tolling." Kriegsmann v. Barry-Wehmiller Co., 739 F.2d 357, (8th Cir. 1984).

Cada's final effort to escape the consequences of his untimely filing is equally unavailing. He argues that by failing to assert its timeliness defense during the EEOC proceedings, Baxter has waived the defense. Although it is true that the timeliness requirement is subject to waiver, Cada has not cited a single case, and the court is aware of none, where the failure to assert the timeliness defense in EEOC proceedings resulting in waiver of the defense, despite defendant having raised the defense in his answer. In the absence of any

such authority, the Court holds that Baxter has not waived its timeliness defense.

In sum, Cada failed to file his EEOC charges within the three hundred-day filing period and has failed to persuade the Court that the period should be tolled. Accordingly, Baxter's motion for summary judgment is granted.

MR. CONNELL: Thank you, Judge.

MS. MATIAS: Thank you, your Honor.

MR. CONNELL: Will we receive a copy of the decision, your Honor, or should we --

THE COURT: You will have to order one from the reporter.

MR. CONNELL: Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause.)

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/S/ James W. Cheek 3-20-90

Supreme Court, U.S.
FILED
JUN 4 1991
OFFICE OF THE CLERK

No. 90-1697 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH F. CADA,

Petitioner,

v.

BAXTER HEALTHCARE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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20

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly affirmed the district court's entry of summary judgment.

2. Whether the Court of Appeals correctly determined that the limitations period began to run when the adverse employment decision was made and communicated to Cada.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS RELEVANT ON REVIEW	3
REASONS THE WRIT SHOULD NOT BE GRANTED	6
ARGUMENT	7
I. THE COURT SHOULD NOT GRANT CERTIORARI	7
A. The Court Of Appeals Properly Affirmed The District Court's Entry Of Summary Judgment, In Accordance With The Rules Governing Summary Judgment	7
B. The Court Of Appeals Correctly Determined That The Limitations Period Began To Run When The Adverse Employment Decision Was Made And Communicated To Cada On May 5, 1987	10
CONCLUSION	15

TABLE OF AUTHORITIES

CASES	PAGE
Abramson v. University of Hawaii, 594 F.2d 202 (C.A. 9, 1979)	11
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	8, 9
Barnes v. Hillhaven Rehab. & Convalescent Center, 686 F. Supp. 311 (N.D. Ga. 1988)	12
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	8
Delaware State College v. Ricks, 449 U.S. 250 (1980)	11, 13
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949)	15
Hammock v. American Pad & Paper Co., 41 Fair Empl. Prac. Cas. (BNA) 1598 (E.D. Wis. 1986)	12
Heiar v. Crawford County, Wis., 746 F.2d 1190 (C.A. 7, 1984), *cert. denied*, 472 U.S. 1027 (1985)	11
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	8, 9
Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974)	10
Mull v. ARCO Durethene Plastics, Inc., 784 F.2d 284 (C.A. 7, 1986)	12
Palucki v. Sears, Roebuck & Co., 879 F.2d 1568 (C.A. 7, 1989)	9
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)	10

RULES

Fed. R. Civ. P. 56 ..... 8, 14

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 *et seq.* 2

No. 90-1697

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JOSEPH F. CADA,

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BAXTER HEALTHCARE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Baxter Healthcare Corporation, respectfully urges that the Petition for Writ of Certiorari filed by Petitioner, Joseph Cada, be denied.

STATEMENT OF THE CASE

On December 12, 1988, Petitioner Joseph F. Cada ("Cada") filed a Complaint in the United States District Court for the Northern District of Illinois alleging that Respondent Baxter Healthcare Corporation ("Baxter")[1]

[1] Pursuant to Supreme Court Rule 29, Baxter respectfully submits that it has no parent companies or subsidiaries which have an interest in the outcome of this appeal.

had engaged in unlawful and discriminatory employment practices and actions, and that Baxter had willfully or unwillfully discriminated against Cada on account of his age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Sec. 621 *et seq.*

After conducting substantial discovery with respect to the allegations contained within Cada's complaint, Baxter moved for summary judgment on the grounds that: (1) Cada's Complaint was time-barred due to Cada's failure to file a Charge with the Equal Employment Opportunity Commission ("EEOC") within 300 days from the date that he was notified of his termination; and (2) even assuming *arguendo* that Cada's Complaint were not time-barred, Cada had failed to raise a genuine issue of material fact as to his age discrimination claim.

On March 20, 1990, district court Judge Harry D. Leinenweber granted Baxter's motion for summary judgment (Cada Petition App. A17-A30). Judge Leinenweber reasoned that the 300 day limitations period in which Cada could have filed a Charge of age discrimination with the EEOC began to run on May 5, 1987, when Cada received notice of his termination (*Id.* at A20-A21). Judge Leinenweber rejected Cada's assertion that he received notice of his termination on May 22, 1987, and likewise rejected Cada's equitable tolling arguments and contemplated effort to include a failure-to-hire claim (*Id.* at A25-A29). Accordingly, Judge Leinenweber ruled that Cada's Charge of age discrimination was not filed within 300 days of Baxter's allegedly discriminatory act and granted Baxter's motion for summary judgment (*Id.* at A29).

Cada appealed the district court's grant of summary judgment to the United States Court of Appeals for the Seventh Circuit. A three-member panel of that Court, consisting of Judges Wood, Easterbrook and Posner, received

the briefs of the parties and heard oral argument. On December 13, 1990, the Seventh Circuit panel issued a unanimous decision (*see* Cada Petition App. A5-A16). In its opinion, which was written by Judge Posner, the Seventh Circuit affirmed the district court's order and awarded Baxter its costs incurred in defending Cada's appeal. More specifically, Judge Posner stressed that Baxter had presented "compelling, as well as uncontested, evidence, which no rational jury would be entitled to discount, that he [Cada] knew he had been fired" on May 5, 1987 (Cada Petition App. A15-A16). In affirming that Cada had failed to timely file his charge with the EEOC, Posner also emphasized that "*Ricks* establishes that it is the date of firing or other adverse personnel action, not the date on which the action takes effect and the plaintiff is terminated, that—provided it is communicated to the employee, and it was here—is the date of accrual" (*Id.*).

On December 27, 1990, Cada filed a Petition for Rehearing with the Seventh Circuit, which was denied on January 17, 1991 (*Id.* at A1-A2). Cada subsequently submitted the pending Petition for Writ of Certiorari to the Supreme Court of the United States on May 6, 1991.

STATEMENT OF FACTS RELEVANT ON REVIEW

Cada has set forth in his petition for review a statement of "facts" which is neither accurate nor substantiated by *any* citation to the record which was before the Court of Appeals. Accordingly, Baxter refers this Court to the following undisputed facts:

- Throughout his employment with Baxter's V. Mueller Division, Cada was responsible primarily for the production of the armamentarium, *i.e.*, the catalog in which

that Division describes its drug products (Cada Petition App. A6; *see also* R.36-1: Cada Dep. 56, 59-60).

- In early 1987, Jim Becks, who was a Director of Sales and Marketing with the Company, became Cada's supervisor with respect to production of the catalog. Becks requested that Cada provide him with a report regarding the catalog's timetable, costs and vendor management. Becks soon discovered that considerable problems existed in all of these areas, and he relayed his dissatisfaction to Cada (Cada Petition App. A6; *see also* 7th Cir. App. 116, 119; R.36-2: Cada Dep. 218, 220).

- In April 1987, Becks was promoted to Vice-President of Business Planning and Development, and he retained supervisory authority over the catalog project. Because the project was chronically behind schedule and over budget, Becks asked Cada for a comprehensive report on the status of the Creative Services department (Cada Petition App. A6; *see also* 7th Cir. App. 120-24, 127; R.36.4: Cada Dep. 372-74).

- After receiving this report, Becks discussed the project with the Company's president and several vice-presidents during a series of meetings during late April of 1987. The general consensus was that Cada was falling short in meeting his responsibility for managing the catalog project. They eventually decided that the department should be reorganized to emphasize more aggressive and strategically-oriented tactics for marketing Baxter products, and that Cada was not the person to head the newly created department (Cada Petition App. A6; *see also* R.37-1: Bolton Dep. 57-58, 61, 66, 71; R.40-2: Becks Dep. 252-53, 259, 235-38).

- After the decision had been made to terminate Cada and to establish a new direction for the Creative Services department, Becks arranged an 8:00 a.m. appointment with Cada for May 5, 1987. Becks met with Cada on May 5, and advised Cada that his department was being reorganized, that Cada was not going to be part of the new direction, and that his position was being eliminated. Becks told Cada that he would be terminated about two weeks after a manager for the new Marketing Communications department were hired, which would probably be in early July (Cada Petition App. A6; *see also* 7th Cir. App. 89, 164, 167-69; R.37-1: Bolton Dep. 70-72).

- During his deposition, Cada specifically recalled his May 5 conversation with Becks as follows:

  Q. [By Mr. Connell] And then what did [Becks] say to you [on May 5, 1987]?

  A. [By Mr. Cada] *Mr. Becks said the decision had been made, and that they were searching for my replacement*, who would probably be in the organization around the end of June, early July; *and that I could expect to be terminated about two weeks after that*, because they wanted me to stay on for awhile to orient the new person.

  He said that I would receive payment until the end of the year. That I would receive a generous retirement package, and that I should not discuss this with my personnel when I got—when I got back to the office until he had the opportunity to discuss my retirement with them, and to talk to them about the reorganization of the department.

  (7th Cir. App. 88-89, emphasis added).

- Immediately after meeting with Becks on May 5, Cada went to Baxter's human resources department and obtained a packet of outplacement and benefit forms, which he completed only a few days later (Cada Petition App. A6; *see also* 7th Cir. App. 92, 95, 104-05, 155).
- On May 5, 1987, Cada also met with an outplacement consultant, and he continued to attend outplacement counseling sessions throughout the remainder of his employment with Baxter. Cada's last day of work was July 31, 1987 (Cada Petition App. A6; *see also* 7th Cir. App. 133, 153, 175-76).
- On March 4, 1988, more than three hundred (300) days after receiving notice of his termination on May 5, 1987, Cada filed a complaint of age discrimination with the EEOC by submitting an unauthorized Charge and completing an EEOC interview (Cada Petition App. A7; *see also* 7th Cir. App. 110).

REASONS THE WRIT SHOULD NOT BE GRANTED

The decision sought to be reviewed here is consistent with the decisions of this Court, as well as the United States Court of Appeals, regarding the standards for summary judgment and the beginning of the 300 day limitations period under the ADEA. Review by this Court could only result in unsettling what has previously been settled.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI

A. The Court Of Appeals Properly Affirmed The District Court's Entry Of Summary Judgment, In Accordance With The Rules Governing Summary Judgment

For the most part, Cada's Petition for Writ of Certiorari consists of nothing more than a diatribe against the granting of summary judgment by district courts in any and all claims under the ADEA, including his. Cada apparently argues that summary judgment was inappropriate in this case because the district courts in general are improperly relying upon Rule 56 in order "to clear their calendars." Through even more convoluted logic, Cada recklessly claims that Judge Posner's "intellectual bias" influenced the outcome of this case at the appellate level. Clearly, as addressed below, these arguments do not meet this Court's standards for granting a writ of certiorari.

With respect to Cada's claims that the district court misapplied the Rule 56 standard, and that the Court of Appeals was unduly influenced by Judge Posner's "intellectual bias," Baxter notes that any reference whatsoever to the findings set forth in the well-reasoned and detailed opinions of the district court and the Seventh Circuit is notably absent from Cada's petition. Rather than address the specific findings made and the standard actually adopted by the lower courts, Cada has instead set forth the outcome which he believes the summary judgment standard should have delivered in his case, and has made vague assertions that the standard has been misapplied.

To support his broad-based argument that courts have diverged from the appropriate Rule 56 summary judgment standard, Cada relies upon authority which he has quoted directly from the head notes of an annotated version of

the Federal Rules of Civil Procedure (*see* Cada Petition 30-35). Thus, in his Petition to this Court, Cada has attempted to conceal that the standard which was applied by both the district court and the Seventh Circuit in this matter is precisely the standard which has been clearly and carefully annunciated by this Court over the last five years. In contrast, all of the cases cited in Cada's petition are cases which addressed the summary judgment standard as it was interpreted and applied *before* the Supreme Court "trilogy" of cases, which articulated the appropriate summary judgment standard for courts to apply in determining whether a plaintiff has raised a "genuine issue as to any material fact" under Federal Rule of Civil Procedure 56. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In these cases, the Court emphasized that the party opposing summary judgment may not simply rest on its pleadings, but must provide sufficient evidence such that a reasonable trier of fact could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 247. In fact, the Court explained in *Anderson*:

> If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.
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> [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair minded jury could return a verdict for the plaintiff on the evidence presented. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

Id. at 251 (emphasis in original; citations omitted); *see also Matsushita*, 475 U.S. at 586 (emphasizing that the party must do more than simply "show that there is some metaphysical doubt as to the material facts," and recognizing the propriety of summary judgment "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party").

The rest of Cada's argument similarly suffers from his failure to recognize this Court's carefully expressed standard for summary judgment. He bases his claims that Baxter argued for a "variant rule" for summary judgment and that Judge Posner is guilty of "intellectual bias" on *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568 (C.A. 7, 1989). In *Palucki*, however, the court adopted and applied the standard set forth by this Court in *Celotex*, *Anderson* and *Matsushita*. As Judge Posner stated in *Palucki*:

> The district court must still make a judgment as to whether the evidence, interpreted favorably to the plaintiff, could persuade a reasonable jury that the employer had discriminated against the plaintiff. Cf. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). If not, the court must grant the employer's motion for summary judgment.

Id. at 1570. This consistency among the pronouncements of the Supreme Court and Judge Posner confirm that the goal that Cada claims to pursue—*i.e.* that "the same rules applicable to other cases apply in Age Discrimination in Employment cases"—is already being met, and was met in this case. This consistency also reflects the regrettable ease with which Cada would apparently attempt to tar a noted jurist with claims of "intellectual bias."

Finally, Cada's own argument disputes his claim that federal courts are abusing the summary judgment procedure and misapplying the Rule 56 standard in order to "clear their calendars" (*see* Cada Petition 36). In support of his argument, Cada cites a multitude of cases in which a district court's grant of summary judgment has subsequently been *reversed* by Courts of Appeals, including the Seventh Circuit, upon review (*see id.* at 36-40). Taken to its logical extreme, however, Cada's argument actually *confirms* the legitimacy of the Seventh Circuit's affirmation of the district court's order, as the Seventh Circuit—which Cada has thus apparently credited with carefully scrutinizing lower court orders granting summary judgment motions—found after careful consideration in this case that his claim fell within the ambit of cases which Rule 56 was designed to resolve without further litigation. Because Cada's criticism of the application of Rule 56 to the present case is wholly unsupported, his petition for writ of certiorari should be denied. *See, e.g., Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974) ("[t]his court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied"); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

B. The Court Of Appeals Correctly Determined That The Limitations Period Began To Run When The Adverse Employment Decision Was Made And Communicated To Cada On May 5, 1987

Both the lower court and the Seventh Circuit reviewed the extensive evidence presented in this case and found that Cada was notified of his termination on May 5, 1987. Accordingly, both courts determined that, because Cada did not file his Charge of discrimination within 300 days of May 5, 1987, Cada's claim of age discrimination was

time-barred and Baxter's motion for summary judgment was warranted.

In his Petition for Writ of Certiorari, Cada asserts that the appropriate standard for determining when the limitations period begins to run is when the aggrieved employee receives clear and unequivocal notice of an adverse employment decision, from a proper authority which could not be misapprehended by the employee (*see* Cada Petition 1-2, 24, 41-43, 45-46). Cada then argues that, in the present case, although Cada "received some sort of notice from Becks on May 5, 1987," this notice was insufficient to begin the limitations period (*see id.* at 45).

Cada's analysis is fatally flawed in several respects. To begin, Cada overlooks the fact that this Court long ago clarified that the time period for filing a charge with the EEOC begins to run at the time an aggrieved party is notified of the alleged discriminatory act. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The *Ricks* decision further clarified that a filing period begins to run when a decision is made and communicated to the employee and, by focusing only upon the notice given and not which authority gave the notice, recognized that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* become most painful." *Id.* at 258 (emphasis in original) (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (C.A. 9, 1979)).

Furthermore, the Seventh Circuit has repeatedly adopted this rule. *See, e.g., Heiar v. Crawford County, Wis.*, 746 F.2d 1190, 1194 (C.A. 7, 1984), *cert. denied*, 472 U.S. 1027 (1985). The courts have confirmed that when an aggrieved party receives notice of a final employment decision, the time period begins to run at the time of notice rather than from the time of that party's actual termination of employ-

ment. *See, e.g., Mull v. ARCO Durethene Plastics, Inc.*, 784 F.2d 284, 288 (C.A. 7, 1986). Thus, despite Cada's arguments to the contrary, it is clear that summary judgment is appropriate on the issue of timeliness in those cases where an employer has given the complaining employee notice of termination. *See id.* at 288-89 (plaintiff's deposition testimony failed to raise genuine issue; no factual dispute existed under Rule 56(c) where plaintiff relied on the bare assertion that an issue as to the time of his notification existed).

Consistently, the fact that Cada claims he did not "subjectively believe" he had been notified of an adverse employment decision is not enough to create a genuine issue of material fact regarding the timeliness of his subsequent filing of a charge. Indeed, courts have explicitly recognized the irrelevance of such subjective belief on the part of a plaintiff. *See, e.g., Hammock v. American Pad & Paper Co.*, 41 Fair Empl. Prac. Cas. (BNA) 1598 (E.D. Wis. 1986) (granting summary judgment on timeliness grounds based upon employee's receipt of oral suggestion that he "look for another job," even though plaintiff submitted an affidavit that "it was unclear to [him] whether this was a suggestion or if in fact [he] was being terminated and employee handbook required written notice of termination); *Barnes v. Hillhaven Rehab. & Convalescent Center*, 686 F. Supp. 311 (N.D. Ga. 1988) (holding that period for filing EEOC charge was triggered when employee was clearly informed that she would have to resign or be discharged, despite plaintiff's claim that the time period had not yet begun because she had attempted to dissuade the decision-makers, where no indication was given to her that the decision was anything other than final).

In the present case, the Seventh Circuit applied the well-established standards which are set forth above, and

confirmed that "*Ricks* establishes that it is the date of firing or other adverse personnel action, not the date on which the action takes effect and the plaintiff is terminated, that—provided it is communicated to the employee, and it was here—is the date of accrual." (Cada Petition App. A16). That court considered *Ricks* in depth, as well as the risk that allowing casual exceptions to the *Ricks* standard would make deadlines illusory. The Court of Appeals then addressed and explicitly rejected Cada's claim that because Becks was not his immediate supervisor on May 5, he was not aware that he had been given notice of his termination on that date. The Seventh Circuit noted, for example, that, in full compliance with the *Ricks* standard, Cada was notified of the termination decision on May 5. In his detailed opinion, Judge Posner specifically found that:

> Baxter submitted to the district court a mass of testimonial material all to the effect that, before May 5, the president of the division of Baxter in which Cada worked had authorized Becks to reorganize the creative services department and in the process to jettison Cada. *This evidence, which was not contradicted, showed that Becks was authorized to fire Cada and that he did so at the May 5 meeting.* By Cada's own version of the meeting of May 22 with Stauner, Stauner merely made clear at that meeting that Becks had been acting within his actual authority when he fired Cada. The May 5 meeting was the equivalent of the tenure vote in *Ricks*. It was the making and communication to Cada of the decision to fire him effective within a few weeks after Cada's replacement came on board.

(Cada Petition App. A8) (emphasis added).

In addition to the facts set forth above, the Seventh Circuit reasonably found further confirmation of the unequivocal nature of the notice which Cada received on

May 5. That same day, for example, Cada went to the Company's human resources department and obtained a packet of outplacement and benefit forms, which he completed a few days later (*see id.* at A6). Even if Cada's subjective beliefs were relevant to the limitations issue at hand, such behavior certainly confirmed Cada's awareness of an adverse employment decision on May 5.[2] The Seventh Circuit, in accordance with the opinions of this Court, carefully considered the evidence presented in this case, and properly concluded that on May 5, 1987 an ad-

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[2] Indeed, in addition to the specific factual findings made by the Seventh Circuit, a review of the following undisputed evidence which Baxter presented to the lower courts under Fed. R. Civ. P. 56 further confirms Becks' authority, and his communication to Cada of the Company's official termination message, on May 5:

(1) After meeting with Cada on May 5, Becks met with Cada's staff that same day and, when they returned, they were upset and told Cada that he had been "shafted" (7th Cir. App. 41-42, 135-37);

(2) At no time did the person Cada claims should have fired him—Jim Stauner—ever inform Cada that he was his direct supervisor, and indeed, Cada had never even met with Stauner as of May 5, 1987 (7th Cir. App. 61, 106, 157);

(3) Cada himself later described the May 5, 1987 conversation with Becks in a written letter as follows:

> In May of '87, I was notified *by my new supervisor* that, since I was approaching 65 in August, *he had made plans to replace me.* My separation was effective at the end of July and I would receive, as *termination* payment, a continuation of my salary through the end of '87, full payment for vacation time accrued, and free outplacement services through a company named "Mainstream." He reasoned that this was a generous offer.

(7th Cir. App. 159, emphasis added; *see also id.* at 144);

(4) Cada dramatically circled the date of his meeting with Becks in his calendar (7th Cir. App. 154); and

(5) Cada admitted that the personnel employee who handed him his severance packet on May 5 said, "I'm sorry" (7th Cir. App. 94).

verse employment decision was made and communicated to Cada, and that his claim was therefore time-barred.[3] Accordingly, because there is no significant legal controversy and Cada's Petition has failed to raise obvious errors in the decisions of the courts below, Cada's Petition should be denied. *See Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (and cases cited therein) (denying a petition for writ of certiorari where the court of appeals affirmed the order of a district court).

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[3] The district court and the Seventh Circuit also recognized the inapplicability of the equitable tolling doctrine to Cada's case. The Seventh Circuit's opinion emphasizes that this doctrine is unhelpful to Cada, in light of the fact that he let eight months lapse from when he saw his younger alleged replacement until he filed his charge. The Court also emphasized that Cada had admitted that he first considered filing a complaint of discrimination "[w]hen [he] started kicking [him]self in the fanny for letting it go so long" (Cada Petition App. A14; *see also* 7th Cir. App. 150-151).